Dr Chandra Muzaffar v Universiti Malaya

HIGH COURT (KUALA LUMPUR) — ORIGINATING SUMMONS NO R2-25-36 OF 1999
AZMEL J
4 AUGUST 1999

Administrative Law *— Remedies — Certiorari and mandamus — Application for leave to apply for certiorari and mandamus — Refusal to renew employment contract and not dismissal — Whether proper for court to entertain application under O 53 of Rules of the High Court 1980 — Whether premature to discuss issue of merits at leave application stage — Whether respondent in ex parte leave application stage has right to lodge appeal against decision*

The applicant was appointed on yearly basis by the respondent as the director and professor of civilisation and dialogue centre of the respondent university with effect from 1 March 1997. After having the applicant's contract renewed for the second year, the respondent issued a letter to the applicant dated 18 February 1999 indicating that on the expiry of the second year, the contract would no longer be renewed. The applicant's contract was terminated on 28 February 1999. The applicant applied for leave to apply for an order of certiorari to quash the decision of the respondent and mandamus to direct the respondent to make a decision in accordance with law by reinstating the applicant. The issues were: (i) whether it is proper for the court to entertain an application under O 53 of the Rules of the High Court 1980 as the applicant's complaint was on refusal to renew the contract rather than a dismissal; (ii) whether it would be premature to discuss issue of merits at this leave application stage; and (iii) whether the respondent in the leave application stage has the right to lodge an appeal against the decision as the applicant's application for leave was made ex parte.

Held, granting leave to the applicant to apply for the order of certiorari and mandamus:

(1) The respondent is a creature of a statute and the applicant was an employee of the respondent at the time of the incident. The decision that had been made by the respondent had direct effect on the employment of the applicant. It is not improper for the applicant to commence an action in this court under O 53 of the Rules of the High Court 1980 (see p 176F–G).

(2) It would be premature to discuss issue of merits at this leave application stage. The respondent would not in any way be prejudiced as such arguments on merits can be appropriately done at the later stage (see p 178A); *Dr Amir Hussein v Universiti Sains Malaysia* [1989] 3 MLJ 298 distinguished.

(3) The respondent at this leave application stage does not have the right to lodge an appeal against the decision for leave because the respondent is not made a party to the application yet. Only the

applicant was a party to this ex-parte application and only the applicant has the legal capacity to lodge an appeal if he is not satisfied with the decision. The appeal by the respondent should be summarily struck off for want of locus (see p 177A–B).

[Bahasa Malaysia summary

Pemohon dilantik secara tahunan oleh responden-responden sebagai pengarah dan profesor pusat tamadun dan dialog di universiti responden mulai 1 Mac 1997. Setelah kontrak pemohon diperbaharui untuk tahun kedua, responden telah mengutus sepucuk surat kepada pemohon bertarikh 18 Februari 1999 menunjukkan bahawa pada tempoh tamat tahun kedua, kontrak tersebut tidak akan diperbaharui lagi. Kontrak pemohon telah ditamatkan pada 28 Februari 1999. Pemohon telah memohon kebenaran untuk memohon satu perintah certiorari unutk membatalkan keputusan responden dan mandamus untuk mengarahkan responden membuat keputusan menurut undang-undang mengembalikan jawatan pemohon. Isu-isunya adalah: (i) sama ada adalah betul untuk mahkamah melayani suatu permohonan di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 memandangkan aduan pemohon adalah lebih mengenai keengganan untuk memperbaharui kontrak tersebut daripada satu pemecatan; (ii) sama ada adalah pramasa unutk membincangkan isu merit-merit di peringkat permohonan kebenaran tersebut; dan (iii) sama ada responden di peringkat permohonan kebenaran mempunyai hak untuk membuat satu rayuan terhadap keputusan tersebut oleh kerana permohonan kebenaran pemohon telah dibuat secara ex parte.

Diputuskan, memberikan kebenaran kepada pemohon untuk memohon satu perintah certiorari dan mandamus:

(1) Responden merupakan badan yang dibentuk oleh statut dan pemohon merupakan seorang pekerja kepada responden pada masa kejadian tersebut. Keputusan yang telah dibuat oleh responden mempunyai akibat langsung ke atas pekerjaan pemohon. Adalah tidak salah bagi pemohon memulakan satu tindakan di dalam mahkamah ini di bawah A 53 Kaedah-Kaedah Mahkamah Tinggi 1980 (lihat ms 176F–G).

(2) Adalah pramasa untuk membincangkan isu merit di peringkat permohonan kebenaran tersebut. Responden tidak di dalam apa keadaanpun diprejudiskan kerana hujah-hujah atas merit boleh dibuat pada peringkat kemudiannya (lihat ms 178A); *Dr Amir Hussein v Universiti Sains Malaysia* [1989] 3 MLJ 298 dibeza.

(3) Responden di peringkat permohonan kebenaran ini tidak mempunyai hak untuk membuat satu rayuan terhadap keputusan untuk kebenaran kerana responden tidak dijadikan pihak kepada permohonan itu lagi. Hanya pemohon merupakan pihak kepada permohonan ex parte ini dan hanya pemohonlah mempunyai

keupayaan sah unutk membuat satu rayuan jika beliau tidak berpuashati dengan keputusan tersebut. Rayuan oleh responden sepatutnya dibatalkan secara ringkas oleh sebab ketiadaan locus (lihat ms 177A–B).]

Notes

For cases on certiorari and mandamus, see 1 *Mallal's Digest* (4th Ed, 1998 Resissue) paras 307–318.

Cases referred to

Dr Amir Hussein v Universiti Sains Malaysia [1989] 3 MLJ 298 (distd)
Ganda Oil Industries Sdn Bhd v Kuala Lumpur Commodity Exchange [1988] 1 MLJ 174 (refd)

Legislation referred to

Rules of the High Court 1980 O 53

Ambiga Sreenivasan (*Siva Kumar*) (*Skrine & Co*) for the applicant.
Azizah Nawawi (Senior Federal counsel) (Attorney General Chambers) (on invitation).
KK Wong (*Hwang Min-Mei* with him) (*Lee Hishamuddin*) for the respondent (on invitation).

Azmel J: In this case the applicant made an ex-parte application for the following reliefs:

(1) That the applicant be granted leave to apply for an order of certiorari to remove into this honourable court for the purpose of it being quashed the decision in writing made on 18 February 1999 by the respondent;

(2) That the applicant be granted leave to apply for an order of mandamus directing the respondent to make a decision in accordance with law within seven days of an order of this court by reinstating the applicant as director and professor of the centre of civilisational dialogue of the respondent without any loss of benefit;

In the alternative to para (1) and (2) above,

(3) That the applicant be at liberty to seek the appropriate order/relief from this honourable court against the respondent pursuant to para 1 of the Schedule to the Court of Jurisdiction Act 1964 and s 25 thereof;

(4) That the costs incidental to the application herein be costs in the cause; and

(5) That all necessary and consequential directions and orders be given.

The applicant was appointed as a contract officer on yearly basis by the respondent as the director and professor of civilisation and dialogue centre

of the respondent university with effect from 1 March 1997. After having the applicant's contract renewed for the second year the respondent issued a letter to the applicant dated 18 February 1999 indicating that on the expiry of the second year the contract would no longer be renewed. The respondent stated the position held by the applicant would no longer be filled by a contract officer. The applicant's contract was terminated on 28 February 1999. It was against this refusal to renew his contract that the applicant filed this action in court.

This matter before me was an *ex-parte* application for leave to apply for the reliefs as mentioned above. Having regard to the fact that the employment of the applicant by the respondent was on the basis of yearly contract and that the applicant's complaint was on refusal to renew the said contract rather than a dismissal, I invited the counsel for the applicant to address me on a legal issue ie based on the status of the applicant's employment whether it is proper for this court to entertain an application under O 53 of the Rules of the High Court. Towards that purpose I also invited not only the representative of the attorney general's chambers but also the counsel for the respondent with a view to assist me in arriving at a proper decision regarding jurisdiction. I requested all parties to submit their written submissions simultaneously.

The counsel for the respondent, in his lengthy submission, had strenuously tried to pursuade this court that the leave applied for by the applicant should not be granted. In his effort to so pursuade the court the counsel dealt on the merits on why the application for the order of certiorari should be dismissed. Obviously the counsel for the respondent had not conformed to the area of submission I sought from him. Likewise, counsel for the applicant had also touched on merits aspect of the application. Only the senior federal counsel, who made a short submission, submitted exactly to the point and issue that I was seeking. In her submission she held the view that this court has the jurisdiction to hear such application and said that the leave applied for by the applicant should be granted.

After having considered the submissions by the counsels I arrived at the conclusion that there is nothing improper for this application to be heard by the court. The respondent is a creature of a statute and the applicant was an employee of the respondent at the time of the incident. The decision that had been made by the respondent had direct effect on the employment of the applicant. In such a situation it is not improper for the applicant to commence an action in this court under O 53 Rules of the High Court 1980. Consequently, on being satisfied that this court has the jurisdiction to hear the application I granted the leave to the applicant. It was against this decision that the respondent filed this appeal.

At the outset I must point out that the application for leave by the applicant before me was an ex-parte application. The status of the hearing of such application had not been changed even though I have invited the representative from the attorney general's chambers and counsel for the respondent to appear and submit before me. The reason why I invited the representative from the attorney general's chambers and the counsel for the respondent was to seek their views on a specific legal issue ie whether this

court can proceed to hear the applicant's application. Hence the appearance of the senior federal counsel and the respondent's counsel before me was at my invitation in the capacity as amicus curie. That being the status of the counsel for the respondent I am of the view that the respondent at this leave application stage does not have the right to lodge an appeal against my decision because the respondent is not made a party to the application yet. Only the applicant was a party to this ex-parte application and only the applicant has the legal capacity to lodge an appeal if he is not satisfied with the decision. In the circumstances the appeal by the respondent should be summarily struck off for want of locus.

It may be pertinent for me to also point out that I had stressed to all counsels that in their written submissions I would not be concerned with and would not be interested in the issue of merits of the application. The merits of the application would be fully argued at a later stage in the event leave has been granted. In other words the arguments that I was interested to hear from the counsels at this stage would be confined to the issue of jurisdiction and nothing else. Such being my request I did not request the respondent and the attorney general to file any affidavit in reply. The senior federal counsel in conformity to my request did submit on the issue of jurisdiction only. However counsel for the respondent and counsel for the applicant had exceeded the parameters of their submissions and went on to argue on merits of the application. I was not concerned with that and as such those parts of the arguments on merits were ignored completely.

In support of his argument the counsel for the respondent placed great reliance on two cases namely *Ganda Oil Industries Sdn Bhd v Kuala Lumpur Commodity Exchange* [1988] 1 MLJ 174 and *Dr Amir Hussein v Universiti Sains Malaysia* [1989] 3 MLJ 298. With the greatest respect I do not think these two cases could assist the respondent. In the case of *Ganda Oil* the decision of the Supreme Court to refuse the order of certiorari was made after leave had been granted. Before me counsel for the respondent conceded to this fact. As to the case of *Dr Amir Hussein* Edgar Joseph Jr J (as he then was) had given the opportunity for the respondent to file an affidavit in reply. In other words the learned judge was geared towards hearing full arguments on the merits of the application even though at the stage for the application for leave.

Unfortunately there was no appeal to the Supreme Court to confirm whether the learned High Court judge was right in entertaining arguments on merits at the leave application stage. As far as this case is concerned I have already cautioned all parties that I would not be interested to hear arguments on the merits of the application. It was for that reason I did not request the respondent and the Attorney General to file any affidavits in reply. In the circumstances the case of *Dr Amir Hussein* is distinguishable from the present case.

My decision to grant the leave to apply for the order of certiorari and order of mandamus by the applicant was made after I was satisfied that this court has the jurisdiction to hear such application. The documentations that had been filed by the applicant was found to be in conformity with the requirements of O 53 of the Rules of the High Court 1980. In my view, it

would be premature to discuss issue of merits at this leave application stage. The respondent would not in any way be prejudiced as such arguments on merits can be appropriately done at the later stage.

Leave granted.

Reported by Benjamin Yong